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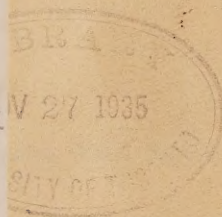
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REPORT

OF

His Honour JUDGE PARKER,
Commissioner appointed by The Inquiries Act
and The Copyright Amendment Act of 1931,
pursuant to Order in Council No. 738,
dated March 22nd, 1935.

Canada. Royal Commission Appointed
to Investigate the Activities of
the Canadian Performing Rights
Society, Limited and Similar Societies.
Report. 1935.



OTTAWA
J. O. PATENAUDE, I.S.O.
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1935

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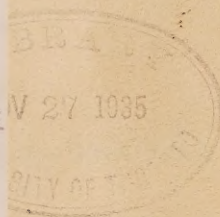
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REPORT
OF THE
Royal Commission Appointed to Investigate the
Activities of the Canadian Performing Rights
Society, Limited, and Similar Societies

THE COMMISSIONER: HIS HONOUR JUDGE JAMES PARKER

To the Governor General in Council,
Ottawa, Ontario.

As Commissioner appointed by Royal Letters Patent, dated the twenty-second day of March, 1935, to investigate and report:—

1. (a) Whether the Canadian Performing Right Society Limited, or any other Society, Association or company, unduly withholds the issue or grant of licences for or in respect of the performance of such works in Canada;
 - (b) Whether the Canadian Performing Right Society Limited, or any other society, association or company, proposes to collect excessive fees, charges, or royalties in compensation for the issue or grant of such licences;
 - (c) Whether the Canadian Performing Right Society Limited, or any other society, association or company, otherwise conducts its operations in Canada in a manner which is deemed detrimental to the interests of the public, and
 - (d) Generally such other matters as the said Commisisoner may deem relevant and material to the said investigation, and report thereon;
2. And to particularly investigate and report on the fees, charges or royalties which the Canadian Performing Right Society Limited, or any such other society, association or company, should be entitled to collect from licensees in compensation for the issue or grant of such licences, and the bases on which such fees, charges or royalties should properly be computed.

I have the honour to make the following report:—

PART I

INTRODUCTION

The Commission after notification to persons obviously interested in the proceedings held its first meeting in Toronto on the 9th of April, 1935, with the object of making arrangements for and determining the method of procedure to be adopted in the conduct of the investigation.

At that meeting the following persons appeared representing the following interests:—

G. W. Mason, Esq., K.C.....	Appearing for the Commission.
A. G. Slaght, Esq., K.C.....	The Musical Protective Society.
A. J. Thomson, Esq., K.C.....	Famous Players Canadian Corporation Limited.
J. C. M. German, Esq., K.C.....	Hotel Association of Canada.
Fred A. Campbell, Esq., K.C.....	Canadian National Exhibition.
E. G. Gowling, Esq.....	Canadian Radio Broadcasting Commission.
Samuel Rogers, Esq.....	Canadian Association of Broadcasters.
K. V. Stratton, Esq., K.C.....	Allied Exhibitors of Ontario.
A. W. Anglin, Esq., K.C.....	(Pro tem) Canadian Performing Right Society.

It was made clear that the Commissioner desired to afford the fullest opportunity to all persons to make representations to the Commission in connection with the matters under inquiry and that while sitting in Toronto the Commission would go into the various branches as far as possible and then sit in Montreal and Ottawa and in any other centres in Canada in which it seemed desirable to hear representations and take evidence. Counsel for the Commission took steps, including notification to the Premiers of all the provinces, to ascertain the places in which the Commission ought to sit for inquiry. As a result the Commission sat in Toronto, Montreal, Ottawa, Halifax, Moncton, Winnipeg and Regina, and was engaged for thirty-three days in hearing evidence and receiving information, and for three days in hearing argument of counsel. Due to the necessity of adjournments from time to time the Commission did not conclude its sittings until the 19th of July, 1935. Altogether there were one hundred and forty-three witnesses who appeared before the Commission and two hundred and seventy-four Exhibits filed.

During the Sittings in addition to those mentioned above the following Counsel representing the following interests appeared before the Commission:—

F. C. Carter, Esq..	Assisting G. W. Mason, Esq., K.C., Counsel for the Commission.
D. Carrick, Esq..	Assisting A. G. Slaght, K.C., Counsel for the Musical Protective Society.
C. F. H. Carson, Esq..	For Famous Players Canadian Corporation.
W. R. West, Esq..	For Canadian National Carbon Company Limited.
R. C. H. Cassels, Esq., K.C., H. G. Nolan, Esq., K.C., and R. A. Hutchon, Esq.	For Canadian Performing Right Society Limited.
J. Sedgewick, Esq., K.C..	For the Attorney General's Department, Province of Ontario.

- J. N. Herapath, Esq. For the City of Toronto.
 F. J. Justin, Esq., and R. H. Parmenter,
 Esq., K.C. For Famous Players Canadian Cor-
 poration.
 A. D. McDonald, Esq. For Canadian National Railways.
 S. J. Dempsey, Esq. For Canadian Pacific Railways, (Mont-
 real).
 E. C. Phinney, Esq., K.C. For Allied Exhibitors of Nova Scotia.
 C. B. Smith, Esq., K.C. For Hotel Association of Nova Scotia.
 C. P. Bethune, Esq. For the City of Halifax.
 W. C. Macdonald, Esq., K.C. . . . For Canadian Performing Right Society
 (Halifax).
 L. McC. Ritchie, Esq. For Allied Exhibitors of New Bruns-
 wick.
 H. E. Sampson, Esq., K.C. For Saskatchewan Motion Picture
 Exhibitors' Association.
 S. B. Woods, Esq., K.C. and S. W. Field,
 Esq., K.C. For Canadian Western Broadcasting
 Association.
 T. Sweatman, Esq., K.C. For Manitoba Exhibitors.
 H. A. Aylen, Esq., K.C. For New Edinburgh Canoe Club,
 Ottawa.

At the commencement of the Inquiry, and for a little time afterwards, it was obvious there were misunderstandings and a hesitancy to appreciate the other side's point of view. Thanks to the fairness of those appearing, or represented by counsel, these misunderstandings soon disappeared. Counsel on the one side appreciated that the other owned rights for the use of which they were legally entitled to compensation; and Counsel on the other side desired fair, and only fair, compensation. The understanding attitude of all parties, and their appreciation of the other's point of view, materially shortened the hearings of the Inquiry. There is reason to hope that one of the results of this Inquiry may be a better understanding between the different interests and, in part at least, a settlement of the differences which at present exist.

Mr. A. G. Slaght, K.C. who was senior counsel for those opposing the new tariffs of the Canadian Performing Right Society Limited, said at the commencement of his argument, after the evidence had been submitted:—

“The investigation cannot help but do good, no matter what the result may be. It will serve to impress upon the public the fact that they (The Canadian Performing Right Society, Limited) have legal rights that the parties they represent have legal rights in copyright, and that the performing rights, with which we are so concerned, is in law a matter for which they are entitled to receive *fair and proper payment*.”

PART II

HISTORY OF LAW OF COPYRIGHT

Counsel for the Commission outlined the law of copyright as it existed at Common Law, and how the rights of Common Law were extended by various statutes, commencing with those passed in the reign of Queen Anne, up to the Copyright Act of Canada, passed in 1921, and the amendment of 1931—a synopsis of which is as follows:

Copyright originally meant the exclusive right of multiplying copies of an original work or composition, but subsequently the meaning of the word was extended to include the exclusive right of performing a work in public. Its object was to protect the fruit of an author's brain. As far back as 1483 legislation was passed to encourage the printing of books, but no Copyright Act was passed in England until the reign of Queen Anne. Chapter 19 of the Statutes of Anne gave authors of books then printed the sole right of printing them for a period of twenty-one years, and of books not then printed for a period of fourteen years, with a provision for a further extension of fourteen years if the authors were living at the expiration of the first term.

The most important of the earlier Imperial Acts was the Copyright Act of 1842, which extended the period of copyright to the life of the author, and seven years thereafter, or a term of forty-two years, whichever should be the longer.

While musical compositions were held to be books within the meaning of the Copyright Acts as far back as the year 1777, there was no protection by Imperial Statutes of the performing right in respect of musical compositions until the year 1842, when Chapter 45 of the statutes of that year gave the author an exclusive right of public performance for forty-two years, or the life of the author and seven years thereafter, whichever should be longer.

The Copyright Act now in force in Great Britain is the Act of 1911, which became necessary because of the agreements made at the International Conventions to which Great Britain became a party, the first being the Berne Convention of 1885.

In Canada, the first copyright statute was the Act of 1875, which provided protection for the author for twenty-eight years, together with a further fourteen years for the author, his wife and children should they survive. The statute required that the work had to be printed and published in Canada, but British authors could get protection in Canada under the Imperial Act of 1842 without observing the provisions of the Canadian Act.

The present Canadian Copyright Act was passed in 1921, came into force on January 1, 1924, and was amended substantially by the amending Act of 1931.

The matter of copyright in musical compositions was comparatively simple when they were published in the form of sheet music, but the question as to what protection should be given to authors became much more complicated with the invention of mechanical means of reproducing sound, and the coming into

use of large numbers of gramophones and other musical instruments. Then came the radio and the sound film, and the employment of many thousands of people in the production of music for broadcasting and the showing of films.

With such developments it became impossible for any individual author or composer to be able to ascertain the extent to which the composition which was the subject of his copyright was being produced in one or other of the many forms of musical production which had come into existence. This made it necessary for authors and composers to have some kind of organization to protect their interests. Such an organization had been existent in France for many years, but the need for such organizations was emphasized by the new conditions which had arisen.

The formation of such organizations gave rise to further problems as to their tariffs for licences to use the music controlled by them on behalf of their members. They acquired a substantial monopoly of musical productions and to a large extent individual authors ceased to make arrangements for the performance of their works by any person except through the medium of these organizations.

The development of mechanical production of music has necessarily reflected itself in the statutory provisions of various countries. Music produced in one country is broadcasted into many countries, and the matter of copyright has, for this reason, been constantly assuming greater international importance.

The Canadian Act of 1921, which came into force on January 1, 1924, carried into effect the provisions of the Berne Convention. The existing Canadian copyright has been described as reciprocal, automatic copyright, the meaning of which is that authors who are subjects or citizens of a country adhering to the Berne Convention enjoy for their works in other countries adhering to the Convention the rights which such countries grant to their own subjects and citizens, and that their enjoyment of these rights is not subject to the compliance with any formality. Registration is no longer required. The United States did not adhere to the Convention, but special arrangements exist with respect to the rights of Canadian authors in the United States. As a result of these arrangements, the Canadian author has the protection of the United States Copyright Act to the same extent as citizens of the United States have, but he must register his copyright at Washington to get the protection of the United States Act.

The Canadian Act of 1921 repealed the Imperial Copyright Statute as to Canada, but this repeal does not affect legal rights existing at the time of repeal. This statute contains no provision expressly covering radiographic performances or reproduction, but certain amendments made in 1931 were designed to deal therewith and to make provision with respect to societies issuing licences in Canada for the performance of mechanical works. The definition of "copyright" was expressly extended to include reproductions, adaptation and public presentation of any musical work by radio.

It was further provided that every society issuing licences for the performance in Canada of musical works should file at the copyright office lists of all works in respect of which such society claimed authority to issue licences or to collect fees, and statements of the fees which it proposed to collect from time to time for the issue of licences.

The amendments of 1931 followed the Rome Copyright Convention of 1928, to which both Great Britain and Canada adhered. This convention includes several provisions safeguarding the rights of authors with respect to the mechanical production of music. These include provisions that the authors of musical works shall enjoy the exclusive right of authorizing the communication of their work to the public by radio; and cinematograph productions shall be protected if the author has given the work an original character.

PART III

PERFORMING RIGHTS

Performing Rights were first protected by Statute in England as early as 1833. The Imperial Act of 1842 gave further protection and both the Imperial Copyright of 1911 and the Canadian Copyright Act of 1921, as amended in 1931, continued the protection of performing rights.

Copyright in a musical work is divided into three separate property rights. They are, first, the right of publication in printed form; second, the right of reproduction on mechanical contrivances; and third, the right of performance. The Copyright Act of Canada sets out specifically what it meant by performing right. In a non-technical sense, and with particular reference to music, it may be described as the exclusive right to perform a musical work in public.

Until recent years, authors, composers and publishers looked mainly to the first property right mentioned above in the form of sales of sheet music for their revenue. With the popularization of records, the second property right came into prominence, and although this provided a new source of revenue to the owner of the copyright, there was a decrease in the sales of sheet music, with a consequent loss of revenue from that source. It is to be observed that these first two rights which were looked to for revenue are not performing rights.

In the last few years the development of radio has caused a decrease in the sale of sheet music and records. The broadcasting stations have undoubtedly familiarized the public with many pieces of music, but the total result has been a reduction in revenue for the authors, composers and publishers from the sale of sheet music and records. The societies which control the copyright, including the performing right, have looked to the fees from licences conferring the performing right upon music users to compensate them in part for the losses suffered from the decrease of sales of sheet music and records. This consideration has been one of the factors determining the tariff of fees for performing rights.

PART IV

INFRINGEMENT OF COPYRIGHT

Section 17 of the Copyright Act (Canada) 1921 as amended by Section 6 of Chapter 8, 21-22 George V, thus defines "*Infringement*":—

"Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright.

"Provided that the following acts (inter alia) shall not constitute an infringement of copyright:—

"The performance of any musical work by any church, college or school, or by any religious, charitable or fraternal organization, provided such performance is given *without private profit* for religious, educational or charitable purposes.

"The performance without private profit of any musical work at any agricultural exhibition or fair which is held by Dominion, Provincial or Municipal authority."

Under the above clause, the institutions had assumed that they were exempt from payment of fees for the performance of music when, although they paid their musicians, they were operating without profit to themselves. However, from the decision in the case of Canadian Performing Right Society, Limited vs. Canadian National Exhibition, reported in 1934 Ontario Law Reports, page 620, it would appear that in such cases they are not exempt. It was there held that even if the exhibition is an agricultural exhibition or fair, the performance complained of was not a performance without private profit. Whether it was or was not a performance without private profit to the defendants, it was not a private performance without profit to the band. The exhibition was held liable to the Society for infringement of its copyright.

PART V

PRESUMPTIONS AS TO COPYRIGHT AND OWNERSHIP

By an amendment to the Copyright Act in 1931, being Section 7 of 21-22 Geo. V, Statutes of Canada, it is provided as follows:—

“In any action for infringement of copyright in any work in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff thereto, then in any such case,

“(a) The work shall, unless the contrary be proved, be presumed to be a work in which copyright subsists; and

“(b) the author of the work shall unless the contrary is proved be presumed to be the owner of the copyright:

“PROVIDED, that where any such question is at issue and no grant of a copyright or of an interest in the copyright either by assignment or licence has been registered under this Act, then in any such case;

“(i) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, that person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work;

“(ii) if no name is so printed or indicated or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purpose of proceedings in respect of the infringement of copyright therein.”

PART VI

CONSTITUTION OF THE CANADIAN PERFORMING RIGHT SOCIETY LIMITED

The Canadian Performing Right Society, Limited, was incorporated in 1925, under the Dominion Companies Act, with a capital stock of 10,000 shares without nominal or par value, with the following among other objects:—

(a) 1. To acquire and hold the rights of performance in public of musical, literary or dramatic works, and to exercise and enforce on its own behalf, or on behalf of persons, being the composers of any musical works or the authors of any literary or dramatic works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyrights in such works (hereinafter called "the proprietors" all rights and remedies in respect of the public performance of such works;

2. In the exercise or enforcement of such rights and remedies, to make, and from time to time to rescind, alter or vary any arrangements and agreements with respect to the public performance of such works in regard to the mode, periods or extent in, for or to which, and the terms on which any public performance of such works may be made, employed, or authorized, and to collect and receive and give effectual discharges for all royalties, fees and other moneys payable under any such agreements or arrangements or otherwise in respect of such public performance by all necessary actions or other proceedings, and to recover such royalties, fees and other moneys, and to restrain and recover damages for the infringement by means of such public performances as aforesaid of the copyrights of such works or any other rights of the proprietors or of the company in respect of such works, and to release, compromise or refer to arbitration any such proceedings or actions or any other disputes or differences in relation to the premises;

3. To obtain from the proprietors such assignments, assurances, powers of attorney or other authorities or instruments as may be deemed necessary or expedient for enabling the company to exercise and enforce in its own name or otherwise all such rights and remedies as aforesaid, and to execute and do all such assurances, agreements and other instruments and acts as may be deemed necessary or expedient for the purpose of the exercise or enforcement by the company of such rights and remedies as aforesaid; upon terms as to payment to the proprietors of moneys received and collected in respect of such rights or as to other consideration, or otherwise;

SUPPLEMENTARY LETTERS PATENT were obtained on the 20th of May, 1930, amending the Letters Patent by converting:—

1. The one thousand (1,000) shares without nominal or par value which are issued fully paid up, non-assessable and outstanding, into one thousand

(1,000) issued fully paid up, non-assessable and outstanding Class "A" shares without nominal or par value;

2. Four thousand (4,000) of the nine thousand (9,000) unissued shares without nominal or par value into four thousand (4,000) unissued Class "A" shares without nominal or par value;

3. The remaining five thousand (5,000) of the unissued shares without nominal or par value into five thousand (5,000) unissued Class "B" shares without nominal or par value; and therefor delete and expunge from the said Letters Patent incorporating the said Company, the capital stock clause reading as follows:—

"The capital stock of the said Company shall consist of ten thousand (10,000) shares without nominal or par value, subject to the increase of such capital stock under the provisions of the said Act, and amending Acts, provided, that the said shares may be sold at a price not exceeding five (\$5.00) dollars per share."

And substitute therefor the following:—

"The capital stock of the said Company shall consist of five thousand (5,000) Class "A" shares and five thousand (5,000) Class "B" shares, all without nominal or par value, one thousand (1,000) of the said Class "A" shares being issued fully paid up, non-assessable and outstanding, subject to the increase of such capital stock under the provisions of the said Act, provided, however, that the four thousand (4,000) unissued Class "A" shares and the five thousand (5,000) unissued Class "B" shares may be issued and allotted for such consideration as may from time to time be fixed by resolution of the Board of Directors, not exceeding five (\$5.00) dollars per share.

"The holders of the Class "A" shares and Class "B" shares respectively shall have the rights and privileges and be subject to the limitations and conditions hereinafter set forth, that is to say:—

"1. The holders of Class "A" shares shall have the sole and exclusive right to vote for the election of one-half of the number of the Board of Directors of the Company which shall always consist of an even number, and the holders of Class "B" shares shall have the sole and exclusive right to vote for the election of the remaining one-half of the number of the Board of Directors of the Company. Each director of the Company shall be elected to hold office until the first annual meeting after he shall have been elected and until his successor shall have been duly qualified and elected. The whole board shall be elected at each annual meeting and shall be eligible for re-election if otherwise qualified. At any meeting at which directors of the Company are to be elected the Class "A" shareholders shall vote by ballot for the election of one-half of the Board and subsequently the Class "B" shareholders shall vote by ballot for the election of the remaining half of the Board."

SHAREHOLDERS OF THE CANADIAN PERFORMING RIGHT SOCIETY LIMITED

The shares are now owned and held as follows:—

Class A Shares:

Performing Right Society Limited.. . . .	4,996 shares
Mr. H. T. Jamieson, Toronto.. . . .	1 share
Mr. John Woodhouse, London, England.. . . .	1 “
Mr. Holmes Maddock, Toronto.. . . .	1 “
Mr. Ralph Hawkes, London, England.. . . .	1 “

Class B Shares:

American Society of Composers, Authors and Publishers	4,997 shares
Mr. Gene Buck, New York.. . . .	1 share
Mr. Louis Bernstein, New York.. . . .	1 “
Mr. E. C. Mills, New York.. . . .	1 “

DIRECTORS AND OFFICERS

Mr. H. T. Jamieson, Toronto, President.
 Mr. Holmes Maddock, Toronto, Director.
 Mr. Ralph Hawkes, London, England, Director.
 Mr. Gene Buck, New York, Director.
 Mr. Louis Bernstein, New York, Director.
 Mr. E. C. Mills, New York, Director.

The first three Directors represent, or are the nominees of, the British Society, viz. the Performing Right Society Limited, and the latter three represent, or are the nominees of the American Society of Composers, Authors and Publishers.

The original Company was incorporated at the instance of the Performing Right Society, Limited, of Great Britain, and Supplementary Letters Patent were obtained so as to permit the American Society of Composers, Authors and Publishers to participate in the ownership of shares in the Canadian Performing Right Society Limited.

On the 6th of January, 1930, the Performing Right Society Limited (British) and the American Society of Composers, Authors and Publishers, each entered into agreement with the Canadian Performing Right Society, Limited, in similar, if not in identical terms, granting to the Canadian Performing Right Society Limited, the exclusive right to license in the Dominion of Canada the public performance of non-dramatic renderings of separate musical compositions.

As will be seen, the Canadian Performing Right Society Limited, since 1930, has been jointly controlled by the Performing Right Society Limited of London, England, and the American Society of Authors, Composers and Publishers, of New York, and was established to exercise and enforce, on behalf of authors, composers and publishers and others, the right of public performance in musical works protected by the Canadian Copyright Act of 1921, to restrain unauthorized

use of the works, and to collect fees for licences to perform the said works in public.

The Canadian Performing Right Society, Limited, represents authors, composers and publishers and arrangers who are members of the American Society of Composers, Authors and Publishers, and the Performing Right Society Limited, of London, England, and its affiliated societies in France, Spain, Italy, Germany, Austria, Brazil, Portugal, Switzerland, Finland, Sweden, Poland, Czecho-Slovakia, Hungary, Denmark, Norway, Roumania, Holland and Belgium.

It is a central bureau established for the convenience of the Copyright owners on the one hand, and the music users on the other hand, and it was conceded by all those appearing at the Inquiry that such a bureau is necessary to protect the performing rights of authors, composers and publishers, and is a convenience to the users of music in obtaining the performing rights.

PART VII

CONSTITUTION OF THE PERFORMING RIGHT SOCIETY LIMITED, OF LONDON, ENGLAND

The Performing Right Society Limited, of London, England, is an association limited by guarantee (not having a share capital) and registered in 1914 under the Company's Act. It was established to exercise the public performing rights in its member musical works, to collect fees in respect of such rights, and to restrain unauthorized performances of said works. Its membership at present numbers 1,205, comprising 824 composers, 225 authors, 24 arrangers, 102 musical publishers, and 10 copyright owners.

In Great Britain, the practice of the British composers and authors in making terms with the publisher to publish their works is to assign to the publisher the whole of their copyright, including the right of public performance.

The Society was formed by the co-operation of a number of composers, authors and publishers, and the latter agreed that composers and authors should become members of the society, to share in the net fees collected by the Society in respect of their works, notwithstanding that they had parted with their performing rights in such works to the publishers.

Members have a right to withdraw from membership at the end of each seven-year period by giving written notice within a month of the expiry of such period. The present Septennial period expires in March of 1941.

All moneys received by the Society are, after deducting the expenses of administration, distributed amongst the members and affiliated foreign societies entitled to them.

The business of the Society is carried on subject to the direction of a Board of twenty-four directors, elected from members of the Society, and comprising an equal number of composers and authors on the one hand, and music publishers on the other hand.

The foreign affiliated societies have been enumerated above, and it is estimated that the aggregate number of foreign authors and composers and music publisher members of these affiliated societies is approximately 40,000.

The Society operates directly in Great Britain and Ireland, and through its agents, in the various British dominions or colonies, and in the case of Canada the Society has an agreement with the Canadian Performing Right Society Limited whereby the Society grants to the Canadian Society the exclusive rights to license in Canada the public performance of the works controlled by it.

The net revenue of the Performing Right Society of London, England, is divided, in the case of vocal works, one-third each to the composers, authors and publishers, and in the case of instrumental works, two-thirds to the composer and one-third to the publishers.

PART VIII

**CONSTITUTION OF THE AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS**

This Society is not an incorporated Company, but is a voluntary association, founded in 1914, for the following purposes, *inter alia*:—

- (a) To protect the composers, authors and publishers of musical works against piracies of any kind.
- (b) To promote reforms in the law respecting literary property.
- (c) To procure uniformity and certainty in the law respecting literary property in all countries.
- (d) To facilitate the administration of copyright laws for the protection of composers, authors and publishers of musical works.
- (e) To abolish abuses and unfair practices and methods in connection with the reproduction of musical works.
- (f) To promote and foster by all lawful means the interest of composers, authors and publishers of musical works.
- (g) To collect royalties and grant licences for the public representation of the works of its members by instrumentalists, singers, mechanical instruments, radio broadcasting stations, or any kind of combination of singer, instrumentalists and mechanical instruments, and to allot and distribute such royalties.
- (k) To enter into agreement with other similar associations in foreign countries providing for the reciprocal protection of the rights of the members of each society.

There is no capital stock, but each of the respective members pays to the Society annually as follows:—

Musical Publishers.. . . .	\$50 00
Composers and Authors.. . . .	10 00
Successors to composers and authors.. . . .	10 00

The membership of the American Society of Composers, Authors and Publishers is, in round figures one thousand two hundred. The method of distribution of the net revenue is not important beyond this, that one-half is paid to the music publisher members, and one-half to author and composer members.

Each member upon election to active membership is required to, and does assign to this Society the exclusive right to license the non-dramatic performance of members' works.

The American Society of Composers, Authors and Publishers is organized to operate in five-year periods. At the end of each five-year period the

member is at liberty to renew his licence to the American Society of Composers, Authors and Publishers for another five years, or to withdraw from membership.

The present five-year period expires on the 31st day of December, 1935, and the American Society of Composers, Authors and Publishers has been notified by music publisher members, representing twenty-five per cent of its repertoire, of their intention to withdraw from membership at the end of this year.

The Government of the Society is vested in, and its affairs managed by, a Board of twenty-four Directors, elected at each annual meeting, not by the members of the Society, but by a two-thirds vote of the entire Board of Directors, and the Board shall always consist of twelve members representing the publisher members, six members representing the author members, and six members representing the composer members.

From this it will be seen that the Board of Directors is self-perpetuating.

PART IX

REPERTOIRE OF CANADIAN PERFORMING RIGHT SOCIETY LIMITED

It may be noted that the Society does not control the performing rights in operas, musical plays, etc. when performed in their entirety, or vocal excerpts therefrom. In respect of such works it only exercises what are known as the "Small rights" as distinct from the stage or dramatic rights.

The Canadian Performing Right Society acquired its rights by assignment from American Society of Composers, Authors and Publishers, and the Performing Right Society, and affiliated Societies.

Most of the present users of music cannot carry on their business and cater to the public without music and it is estimated that between eighty and ninety per cent of the popular and semi-classical music—such as the music user requires—is under the control of Canadian Performing Right Society, and unless the user obtains a licence to perform the repertoire of Canadian Performing Right Society, he has no other supply available and the public are denied the pleasure of hearing music. Competition no longer exists. A monopoly, or super-monopoly, has arisen. No one quarrels with the author, composer and publisher pooling their rights and placing them in a central bureau for the purpose of collecting a fair fee for the same and of preventing infringement thereof. It is an inevitable monopoly existing for the convenience of the owner and the user; but it should not be exercised arbitrarily and without restraint.

It may here be noted—and the fact merits much consideration—that authors, composers and publishers in Canada do not enjoy membership in Canadian Performing Right Society, nor can they until the constitution of the Society is changed. They have no practical means of collecting a reasonable or fair fee for the performance of their works. This must result in discouraging the development of musical genius in Canada and in making the user and the public increasingly dependent on foreign talent. It also militates against the sale of music composed by Canadians. This lamentable situation is appreciated by the President and Directors of Canadian Performing Right Society, but so far they have made only a gesture to rectify the situation. Evidence was given, and it was generally admitted, that we have in Canada several composers of outstanding genius, none of whom derive any benefit from the performance of their works. They are not in a position to form and carry on a Society in competition with a Society having such a large repertoire.

The Society controls approximately two million works, but this repertoire includes innumerable works, many of which are out of print and rarely, if ever, performed.

Mr. Claude Mills, General Manager of the American Society of Composers, Authors and Publishers, stated in his evidence with reference to the repertoire of his Society, that there were 160,000 active numbers, and 300,000 relatively inactive but occasionally used.

It was found on an analysis of the program in Canada for the year 1934 that eighty per cent of the music played by licensees of the Canadian Performing Right Society Limited belonged to the repertoire of the American Society of Composers, Authors and Publishers, and twenty per cent belonged to the Performing Right Society Limited of London, England, and its affiliated societies.

Assuming that all of the 160,000 numbers in the repertoire of the American Society of Composers, Authors and Publishers, were played in Canada in the year 1934, and that this number represents eighty per cent of the pieces played, then the total number of pieces played in Canada would be two hundred thousand, of which forty thousand would belong to the repertoire of the Performing Right Society Limited of London, England.

This, of course, is a remote assumption and rather favourable to the claim of the societies, because on a program analysis it would be found that many popular numbers were frequently performed, so that, if anything, the number of active numbers in the repertoire for which the Canadian Performing Right Society Limited claims to collect a performing right fee is considerably less than 200,000.

An analysis (Exhibit 236) of the Canadian programs of performance of musical numbers for the year 1934 showed that 25,982 different numbers of the Societies' repertoire had been performed and the number of performances totalled 2,155,525. The analysis is as follows:—

	Number of works performed	Total number of performances recorded
Performing Right Society	4,841	377,080
American Association of Composers, Authors and Publishers	16,771	1,615,965
Continental Societies..	4,370	162,480

PART X

ASSIGNMENT OF PERFORMING RIGHTS TO THE CANADIAN SOCIETY

The Performing Right Society Limited assigned to the Canadian Performing Right Society Limited the right of performance in Canada of the music of each and every song or musical work, not a musical play, which now belongs to, or which shall hereafter be acquired by, or be or become vested in the Performing Right Society of London, England; secondly, the right of performance in Canada of the music of each and every musical play of which the right of performance in Canada now belongs to or shall hereinafter be acquired by, or become vested in the Performing Right Society of London, England.

The American Society of Composers, Authors and Publishers assigned to the Canadian Performing Right Society Limited, exclusive right to license in the Dominion of Canada the public performance of non-dramatic renditions of:—

(a) Separate musical compositions, copyrighted or composed by the members of the American Society of Composers, Authors and Publishers.

(b) Any separate musical composition.

But the American Society of Composers, Authors and Publishers reserves the right at any time to retain or withdraw from its repertoire, or the operation of the licence, any musical works. (This clause gives rise to what has been referred to in the evidence as the "restricted list.")

PART XI

SCORE CHARGE

As the "Score Charge" is frequently mentioned in the complaints and in the arguments as being a factor having to do with the consideration of the reduction of the theatre tariffs, it is necessary for the proper understanding, especially by theatre owners, that some explanation of this charge be included in this report.

Mr. Mills, of the American Society of Composers, Authors and Publishers, in his evidence, says:—

"The theatre owner complains that he pays for the films, and then pays a score charge, and then is asked to pay a licence fee by the Canadian Performing Right Society Limited. Regarding the score charge, there is not one single element in this whole music combination that is as confusing, or has been as confused or as difficult to understand, as is the score charge.

"Firstly, the American Society of Composers, Authors and Publishers, or the Canadian Performing Right Society Limited, or both, have never received directly or indirectly in any manner, shape or form, one single cent of that charge assessed against the exhibitors by the producers commonly called 'score charge.'

"With the advent of sound movies, it became necessary for the producers of motion pictures to re-cast their entire operations. The studios in which pictures had been previously produced were useless for the purpose of producing sound pictures. The studios had to be sound-proofed and almost rebuilt. All of the apparatus for making pictures was useless. Sound recording cameras and devices had to be installed. The whole technique of acting for the movies had to be changed. People could no longer say one thing while acting another. The sound had to be synchronized with the acting. The studios had to immediately employ orchestras and to install musical libraries and begin to learn something about music, as well as the spoken voice.

"Now, millions and millions of dollars were spent by the producers of pictures to equip themselves to give the exhibitors a so-called sound picture, which would give to the audience in the motion picture theatre the voices or music in synchronism, or timed in the projection of the picture. The exhibitor, of course, immediately the sound pictures became available for his use, could dispense with his orchestra, his living musicians. In other words, the service of sound pictures to theatres represented a substantial reduction in his operating cost. And the production of those sound pictures represented an unbelievable increase in the cost to producers in order that they might furnish sound pictures to the theatres.

"The producers of pictures incurring this tremendous additional cost assessed against the exhibitors a so-called 'score charge' which was sup-

posed to recoup for the producer his cost, and perhaps a profit, on what was involved in putting the sound track on the film or record the sound on a disc, timed in relation to the film."

Mr. Mills believes that the producers ultimately profited very grossly on that charge.

Mr. Mills continued:—

"The sum paid by the exhibitors on the North American Continent in the aggregate to the producers of pictures under the heading of 'score charges' has been many millions of dollars per annum for the last four years. It has not been paid in any sense as a licence fee for the use of music, except to this extent: *producers of pictures were charged a fee by the owners of musical copyright for a licence to record the music on the film.*

"One hundred per cent of the moneys collected on the score charge goes to the producer, and is one hundred per cent retained by him, except as to the portion of it he pays to the owners of the patent under which he manufactures his sound pictures, and to the owners of copyright for the licence to record the music on the films."

To show the large amount collected in one year in the United States, he says that one-third of eight per cent of the score charges collected in a year was \$8,000,000, which means that approximately \$300,000,000 was collected by the producers of films in one year.

It is to be noted that in Montreal it was suggested that there was still another fee which ought to be imposed on music users in Canada, and that was a fee which should be charged by the manufacturer of records in addition to the fee charged for the sale of the records themselves, and in addition to the performing right fee for the music.

Such a right is not recognized by the law of the United States, but is recognized in our Copyright Act.

Mr. Mills states the theory upon which they base their claim for this charge is that the manufacturers of the records for, say, the voice of Caruso, to whom they paid a high price for a particular song, in their contract with him have taken all of the rights in that particular recording, and they claim that no one has the right to use the record or the recording of that voice. They say "If you buy that record and perform it in public, then you must pay a fee for the use of it."

Mr. Payne is the Chairman of the Board of the Musical Publishers Association, which association is composed of publishers only. It has two general functions. One is to grant synchronization licences to motion picture companies which desire to use music in synchronism, or timed relation to pictures. The other is to grant licences to electrical transcription companies which desire to manufacture devices which can be used for radio performances.

Speaking of the Copyright Law in the United States he says:—

"The talking machine record, *per se*, is not a proper subject of copyright, therefore, it is not copyrighted as it is here in Canada, and no such

right exists under the Copyright Law of the United States in connection with these records, and no claim can be made under the Copyright Law, but the Victor Talking Machine Company has claimed that in connection with these records which they make, they have the common law right in and to the renditions which are eventually engraved upon the records."

"They claim a property right in that, where an individual buys one of these records, and from that record by a re-recording process makes a 'dupe' of that record, and presses from that 'dupe' other records and sells them on the market, the courts of the United States have enjoined the person making that kind of a 'dupe' record, on the ground that the Victor Talking Machine Company had certain property rights therein."

"Based on that decision, the Talking Machine Company felt that they could go further, and that they had a property right which would permit them to enjoin anybody performing it. That is the subject of conversation now, and they claim, eventually, they should have that right recognized by the Copyright Law of the United States."

The origin of the score charge as explained by Mr. Payne, is as follows:—

"When the Western Electric Company originally invented the method by which sound could be used synchronously with pictures, it cast around for somebody in the motion picture field to license under the patents which they controlled, covering its inventions, and they finally made an agreement with the Warner Bros. Pictures, and they gave to Warner Bros. Pictures the exclusive right to use these patents, both in the manufacture of the pictures, *and subsequently in the reproduction of sound which accompanies the pictures*,—patents covering both phases of the work—and Warner Bros. Pictures have the exclusive right to the acquisition of apparatus with which theatres were to be equipped, and they were to become the sales agents of the Western Electric in the sale of this apparatus to theatres."

"Subsequently Warner Bros. Pictures proceeded to manufacture pictures under these processes; the terms of the licence agreement—the exclusive licence agreement—between Warner Bros. Pictures and the Western electric provided that Warner Bros. Pictures were to pay, as a licence fee for the use of these patents, a sum equal to 8 per cent of the amount derived from the exercise of the licence.

"To solve this, they recognized that a picture which they had manufactured and rented to the theatre was not necessarily a sound picture unless the sound was also rented to the theatre to accompany it, and the rental rates which they received from the theatre for the use of that picture in exhibition form was not a fee which was derived from the exercise of the sound licence, and in order to carry out the terms of their licence agreement they incorporated a separate corporation, which they called the 'Vitaphone Corporation', which became the licensee of the Western Electric.

"The Vitaphone Corporation then proceeded to rent the sound to the theatres which would accompany the pictures which Warner Bros. Pictures rented to the theatres.

"Warner Bros. Pictures rented a picture to the theatres, and Vitaphone rented the sound synchronized score to the theatres, which accompanied the pictures.

"For instance, when Warner Bros. Pictures made the Don Juan picture, there had to be sound synchronized scores which could be used in the synchronization or timed relation to a picture, so that Warner Bros. pictures rented the Don Juan picture to a theatre, and the Vitaphone Corporation rented the records on which the sound synchronization score was recorded. They did that in order to ascertain what was the gross derived from the exercise of the licence, and they paid the Western Electric 8 per cent of that gross as a consideration for the right to use these pictures.

"Finally, Warner Bros. Pictures were induced to give up that exclusive contract and they rented the exclusive contract to a new corporation, which Western Electric had then organized, known as the 'Electric Research Products Incorporated,' known in the trade as ERPI.

"ERPI in taking back from the Warner Bros. Pictures this exclusive contract, entered into an agreement with Warner Bros. Pictures whereby they said, 'We will license other motion picture producers to use these patents in the development of sound synchronized pictures, and we will license them on the same terms which you enjoy in your licence, namely, 8 per cent of the gross derived from the exercise of the licence.'

"Warner Bros. Pictures reserved the right to collect three-eighths of the total royalties which ERPI received, and that was the contract.

"The amount which is charged to the motion picture companies for the use of the music in synchronism with the score is largely considered by the motion picture companies as production costs, and goes into the production side of the accounting. The score charge never had anything to do with whether a picture did or did not use music, there was a score charge with all pictures, even those in which there would not be a single piece of music used, but a talking picture all the way through.

"The score charge is collected by the Distribution Company and paid by it to the motion picture producers."

The members of the Musical Publishers Protective Association are all publisher members, and those members are also members of the American Society of Composers, Authors and Publishers. The Musical Publishers Protective Association is composed of thirty publisher members, and through arrangements with copyright proprietors represent in all 157 publishers.

In 1927 they commenced granting licences to motion picture companies for synchronization, and received for licences for the year ended September, 1928, \$104,000; for the year ended September, 1929, \$137,000; for the year ended 1930, \$137,000; for the year ended September, 1931, \$254,000; for the year ended September, 1932, \$310,000. After that a dispute arose over the interpretation of the contract and that dispute was settled by the payment to the Musical Publisher Protective Association of \$515,000.

It has been thought advisable to quote verbatim from the evidence in order to indicate the obscurity surrounding the nature of the score charge and the

ultimate destination of the moneys received from its imposition. It discloses that at least some music publishers have a source of revenue arising out of copyright other than that provided by the fees collected by the Performing Right Societies; but how or to what extent it should affect the theatre tariffs is impossible to determine. A strong impression is left that some persons have divided copyright into many parts—distinct in themselves—so that the right hand does not or cannot know what the left hand is doing. The manifold ramifications of the music taxes and fees by which the organized music industry has exacted millions of dollars from exhibitors and motion picture producers may become the subject of broad federal regulation in the United States of America, is the opinion expressed by film company attorneys.

“Score charge” as such is not heard of in Great Britain but there is a “recording right” held by music publishers under the name of Sound Film Music Bureau, the members of which are substantially publisher members of Performing Right Society (Great Britain).

While it cannot be said that the revenue from these “recording rights” goes directly into the pockets of the Performing Right Society Limited, of London, England, the evidence makes it clear that the members of the Sound Film Music Bureau correspond in large part with the members of the Performing Right Society Limited, of London, England, and thus the money, in part at least, ultimately reaches the same destination.

PART XII

RESTRICTED LISTS

The American Society of Composers, Authors and Publishers has a "restricted list," which applies in Canada as well as in the United States.

When new music is published, authors and publishers, being desirous of reaping the maximum benefit from the performance of their music in certain quarters, and desirous of selling as many copies of sheet music as they can, withhold from the Broadcasting stations a certain number of these works when they are new, generally for an average period of one year, and the radio stations are not permitted, under their licence, to perform any of the musical numbers which the American Society of Composers, Authors and Publishers places on this list, unless the stations directly obtain from the author or publisher the right to do so.

The result is that out of the new and attractive music there are on the average five hundred numbers which the broadcasting stations are not permitted to perform; and it was argued throughout by counsel for the broadcasting stations, that because this music is withheld from them for performance, this should have a bearing upon the broadcasting tariff. This argument can have weight only when comparing broadcasting tariffs of countries, other than the United States, with the broadcasting tariff in Canada.

PART XIII

LICENCES

With few exceptions, licences have been granted by the Canadian Performing Right Society for a period of a year. They are granted, not to the performers, but to the place of performance, and entitle the licensee to perform in the Dominion of Canada non-dramatic renderings of any and every musical work for the time being in the repertoire of the Society. The right to license public performance of such works has been conveyed to this Society by The American Society of Composers, Authors and Publishers by the Performing Right Society, Limited, of England, and by the societies in France, Germany, Austria, Italy, Spain, Sweden, Denmark, Hungary, Poland, Czechoslovakia, Roumania, Switzerland, Portugal, Brazil, Norway, Finland, Holland and Belgium which are affiliated with the British Society.

Only three of the clauses in the licence were objected to, which clauses are as follows:—

(1) "The Society reserves the right at any time to withdraw any musical work from the operation of this licence and/or limit or restrict the use of any musical work, and upon any such withdrawal, limitation or restriction, the Licensee may immediately cancel this licence and receive pro rata refund of any licence fees in the hands of the Society, applicable to the then unexpired part of the licence period.

(2) "The Licensee shall for the duration of this licence, supply to the Society or its authorized agent, weekly by post, on the forms which may be obtained from the Society without charge, a list signed by or on behalf of the Licensee, of all musical works performed, vocally, instrumentally or musically, at the premises hereby licensed, with the names of the author, composer, arranger and publisher of each such work and the number of times each has been performed during the week.

(3) "If the Licensee shall commit any breach of the provisions or conditions hereof or of the covenants contained in the Application Form, or fail to make any payment herein provided or to comply with any other of the terms of this licence, or of the terms of such Application form, on the day named or thereafter within seven days from the date of any demand for payment or compliance, the Society may, notwithstanding anything in this licence expressed to the contrary, forthwith terminate this licence by written notice sent by registered post to the Licensee at the address given herein, and thereupon this licence shall determine, save as to the right of the Society to recover any moneys previously due hereunder. Upon such termination, the Licensee shall forfeit any licence fees in the hands of the Society."

PART XIV

HISTORY AND GENERAL NATURE OF THE TARIFF

The Canadian Performing Right Society Limited, furnished the Commission with the following brief history of the making of the tariff:

"The Society's earliest tariffs were drawn up under instruction and authority received from the British Society, having regard to the tariffs of the British Society, which then had been in operation for eleven years, and having regard to the music users' operating requirements. The intention was, so far as they suited the operating requirements of Canada, to use the British tariffs. Owing, however, to legal difficulties, practically no business was done by the Society before 1930, in which year the American Society joined with the British Society in the control and operation of the Canadian Company. Due to the fact that the tariffs of the American Society were drawn on bases entirely different from those contained in the tariffs of the British Society, it was left to the Canadian management to adopt whatever bases and tariffs appeared best to suit Canadian requirements. The logical basis, of course, would have been to make individual charge for each performance of each individual work, but this basis had been found in European countries not to be practicable. Owing to the fact that the joint repertoire of the several Societies was so large, and the use of it by the music users so frequent, it would have been necessary for the Societies to prepare thousands of different prices for the many classes of works for their use in many different types of establishments, to numberless sizes of audiences, but in particular it would have been necessary for the music user and the Societies to prepare and check expensive and troublesome accounts of the works performed and of the length of times of performances, and of the numbers of the audiences, in order to reckon the amount due, greatly increasing the cost of the Societies' operations and greatly increasing the necessary fees. In other countries all this was seen to be unnecessary as soon as the scope of the Societies' repertoire was recognized; as soon as the music user came to realize that of the works he desired to perform in his performances a large part, and in some cases practically all, were works controlled by the Societies. There has, therefore, come into use in other countries a licence permitting performances at will, to any extent, from the joint repertoire of the Societies, that is to say, a right of user licence.

The basic principles of the right of user licence are two:—

- (1) The maximum length of time within which permission to perform is desired.
- (2) The maximum audience to which permission to perform is desired.

In regard to this second element of user, in every case, without exception, the licence is a licence to perform to a certain estimated potential audience.

The potential audience basis was taken as it provides an economical measure by which the fee can be gauged. A licence on an actual attendance basis would necessitate a higher rate per person to produce the same return given on a potential audience basis because of the extra expense and trouble involved in accounts of, and possible disputes concerning, actual attendance.

PART XV

COMPLAINTS

The major complaint against the Canadian Performing Right Society was in connection with its tariff of fees. The following were the more important objections:—

1. (a) It was stated that the fees were excessive because they were designed to bring to the Society more than a fair return on its investment;

(b) The charge was made that the tariff was excessive because it imposed fees which were beyond the capacity of the music users to pay. A good deal of evidence was submitted showing the financial difficulties experienced by both large and small users of music during the last few years.

(c) It was objected that the minimum fee of \$30.00 required by the Society as a condition precedent to the right to use the Society's music amounted virtually to an undue withholding of its licence, because many small users were wholly unable to pay such a large minimum fee.

(d) The Society can raise its fee as high as it wishes in the future and the music user has no safeguard against such conduct. The Society possesses a monopoly of music and as the music users cannot carry on business without the Society's music, whatever fees are demanded by the Society will have to be paid by the music user.

(e) In connection with broadcasting, it was objected that the fees should be reduced because of foreign competition and interference; that a greater discount should be allowed for each competing broadcasting station in the same broadcasting centre; that stations on the border of Canada and the United States should not be required to pay a higher fee based on the larger number of receiver sets within its effective range in the United States; that the 1934 tariff places an unfair burden on stations in the more thickly populated cities in Eastern Canada.

(f) In connection with theatres, it was stated that the tariffs should not be based entirely on the seating capacity of the theatres, but some allowance should be made for reduced actual attendance; that the Society was receiving revenue from score charges and that performing rights were in reality a second charge.

(g) The hotels objected to a fee being demanded for the use of a radio in the lobby of the Hotel to provide music for its guests and the use of radios in the rooms of the hotels.

(h) In connection with agricultural fairs and exhibitions, it was said there ought to be an exemption for such organizations because they were conducted for governmental and educational purposes and that the Copyright Act should be amended to grant this exemption.

Additional complaints were made against the Society in connection with its mode of operation. The following were some of the more important complaints in this connection:—

2. (a) The Society was accused of using the courts to dragoon the music users into line and obtain payment of its fees.

(b) The Society refused to publish lists showing the pieces of music in which it held copyright, and the music user was unable to ascertain what pieces were not subject to the Society's copyright.

(c) That the returns demanded by the Society showing the number of pieces played, the length of time, the author, etc., imposed an undue burden on the music user, and the Society should be deprived of its right to cancel licenses for failure to make such returns.

(d) That the use of restricted lists deprived the music user of much music that was of great commercial value, and either the practice of having restricted lists should be discontinued or some reduction should be made in the tariff of fees for the inability of a music user to avail himself of this music.

(e) The Society was criticized for so organizing itself that Canadian authors, composers and publishers were excluded from its membership. It was charged that a great deal of music from foreign countries was popularized in Canada through the medium of the Society, and that the general result of the Society's activities in Canada had been to discourage the development of musical talent in Canada and stifle Canadian national musical genius.

PART XVI

DISTRIBUTION OF MONEYS BY CANADIAN PERFORMING RIGHT SOCIETY LIMITED

All moneys collected by the Canadian Performing Right Society from the sale of licences, after deducting the cost of administration, had been transmitted up to 1934 as follows: One-half to Performing Right Society and one-half to the American Society of Composers, Authors and Publishers.

The Performing Right Society in turn distributes the net amount received among its own members and members of the various affiliated Societies; as follows: One-third to the author, one-third to the composer, and one-third to the publisher.

The American Society of Composers, Authors and Publishers, on the other hand, distributes the net amount received by it as follows: Fifty per cent to the publishers and fifty per cent to the composers and authors.

Early in 1934 the British and American Societies adopted a new method of distribution based upon the analysis of programs. This new method of distribution among the parent Societies resulted in payment by the Canadian Society to the American Society of eighty per cent of its net revenue, and to the English Society of twenty per cent of its net revenue. This distribution was based upon an analysis of the programs of the music performed in Canada for that year.

From this it would appear that of the repertoire of American Society of Composers, Authors and Publishers and Performing Right Society and its affiliated Societies, eighty per cent of the music performed in Canada was owned and controlled by the members of American Society of Composers, Authors and Publishers, and twenty per cent was owned and controlled by the Performing Right Society and its affiliated Societies.

No part of the moneys collected up to date by Canadian Performing Right Society has been paid direct to any Canadian author or composer. The evidence disclosed, however, that four or five Canadian composers who had, while residing in the United States, become members of American Society of Composers, Authors and Publishers, had received small amounts from year to year.

While no firm undertaking was given by the British Society or the Canadian Society to pay a portion of the net revenue received by the latter to Canadian authors and composers for the purpose of encouraging them in developing their genius, it was intimated by Mr. James, of the British Society, and not objected to by Mr. Jamieson of the Canadian Society, that probably one-tenth of the Canadian Society's net revenue might be set aside as a fund for that purpose.

PART XVII

FILING OF LISTS

Every user of music in Canada complained that the Canadian Performing Right Society, while claiming copyright in from two to three million musical works, had up to date filed at Ottawa only 105,000 works. It was further claimed that as the user was required to purchase a licence to perform any or all of these works, he should know what he was paying for. The Canadian Society contended that it would be impossible to file a complete list of such an extensive repertoire, and in this the Commission agrees. But when it is established by the evidence that of all the repertoire controlled by Canadian Performing Right Society, there is not more by a liberal computation than 200,000 numbers on the active list, i.e., numbers performed in public, filing of a list of those numbers most commonly performed presents no impossible task. The Commission's conclusion from the evidence is that the Canadian Society, although required by the Copyright Act to do so, was reluctant to comply with the terms of the Act. Mr. Boosey, Chairman of the British Society, when asked regarding this, said they suspected it was requested by the users to enable them to "pick holes." Further evasion of filing requirements that would satisfy the users is shown by the fact that the French Society had forwarded to the Canadian Society a list of some 70,000 of its copyright works, and cards for these were being prepared for filing. When it is shown by program analysis that of the 25,982 musical numbers performed in Canada in 1934 only 4,841 numbers were controlled by Performing Right Society and 4,370 numbers were controlled by all other European Societies, it seems absurd and significant that Canadian Performing Right Society should waste time and money on filing a list of the works that possibly never have been and never may be performed in Canada.

If the Canadian Society, with the co-operation of the parent Societies, would file a list of its active numbers, it would remove the complaint of its Licensees on this score; and in the Commission's opinion there is no valid reason why such a list should not be filed.

The Commission is however, of the further opinion that if a complete list of the active numbers were filed, the list would seldom, if ever, be referred to by the Licensees except, perhaps, to check up on the proportion of the Societies repertoire they were actually performing.

PART XVIII

BROADCASTING TARIFF

The Broadcasting tariff in 1931 of the Canadian Performing Right Society Limited was as follows:—

- \$100 for stations with power under 500 watts,
- \$250 for stations with power under 1000 watts but not less than 500 watts.
- \$500 for stations with power under 2500 watts but not less than 1000 watts.
- \$750 for stations with power under 5000 watts but not less than 2500 watts.
- \$1,000 for stations with power of 5000 watts and over.

After the report of the Hon. Mr. Justice Ewing, in 1932, on the effect of this tariff on stations in the Prairie Provinces, where the number of listeners was found to be smaller than in some other parts of Canada, the finding was apparently accepted by the Canadian Performing Right Society Limited, and no doubt had a good deal to do with the revision of the broadcasting tariff. The report of the Hon. Mr. Justice Ewing has been very helpful to this Commission.

The Canadian Performing Right Society Limited then filed a new tariff in 1934, which is the same as the tariff filed in 1935.

Applying the 1934 tariff to a 100-watt station located in Toronto, the licence fee would be \$353.40 per hour per annum, and if the station performed music during ten hours a day, the annual licence fee would be \$3,534, subject, of course, to a discount based on the number of stations in the Toronto broadcasting area, which discount is as follows:—

- Two stations having the same broadcasting centre, 25 per cent reduction.
- Three stations having the same broadcasting centre, 35 per cent reduction.
- Four stations having the same broadcasting centre, 40 per cent reduction.
- Five stations having the same broadcasting centre, 45 per cent reduction.
- Six stations having the same broadcasting centre, 50 per cent reduction.

A comparison with the fee charged for a 100-watt station under the 1931 tariff shows a great increase, and the stations required to pay the increased fee naturally objected and complained that the new tariff charged was excessive and unreasonable.

Referring to the evidence of Mr. Jamieson, it seems quite clear to this commission that the Canadian Performing Right Society Limited desired to obtain from Canada a fixed gross revenue from its broadcasting licences. The new tariff of 1934 did not reduce the gross revenue that the Society was receiving from licences issued to broadcasting stations, but merely shifted the burden of providing the revenue reduction from the stations in the less thickly populated areas in the West on the stations in the more thickly populated centres in the East.

In arriving at the gross the Canadian Performing Right Society Limited apparently considered the number of radio receiving sets in Canada and concluded that it should receive a revenue based upon an arbitrary price of 10 cents per set.

The British Broadcasting Corporation controls all broadcasting stations in Great Britain, and the licence fee it pays to the Performing Right Society of London, England—a licence fee based upon the number of receiving sets in Great Britain—is at the rate of seven and three-quarters cents per set. It should be borne in mind, however, that the broadcasting stations in Great Britain are not subject to the same degree of interference from outside countries as are stations in Canada. Great Britain is surrounded by countries speaking different languages; while Canada borders on a country with a large population speaking the same language, and with a great many very powerful stations having good reception in Canada. Then, too, the American stations undoubtedly receive a greater relative proportion of national advertising than the Canadian stations.

Furthermore, the evidence disclosed that the number of channels of transmission allocated to Canada by agreement between the Canadian Radio Commission and the Federal Communications' Commission is limited, and several of the channels allocated to Canada are not exclusive channels.

In the United States the method of computing the licence fee for broadcasting stations is somewhat different. After lengthy negotiations the American Society of Composers, Authors and Publishers agreed to grant a licence for broadcasting, and the broadcasting stations agreed to accept a licence, at a fee fixed, first of all, upon a basic sustaining fee plus a percentage of the gross revenue from advertising of each station; and taking the number of radio receiving sets in the United States, and the gross revenue derived by the American Society of Composers, Authors and Publishers from the American Broadcasting stations, the rate per receiving set works out at about nine and one-half cents.

A suggestion was made that a method be adopted in Canada similar to that adopted in the United States, but it was pointed out that such a method could not be applied to the Canadian Radio Commission nor perhaps, to the Manitoba Telephone System.

The Commission is of opinion that the basis adopted by the Canadian Performing Right Society Limited is the better basis.

The Canadian Performing Right Society Limited in arriving at the basic fee of ten cents per receiving set in Canada had regard to the rates charged in other countries, giving the following examples:—

	Cents per set
Denmark.. . . .	13
Great Britain.. . . .	7½
Australia.. . . .	30
United States.. . . .	9½
Germany.. . . .	9
Austria.. . . .	10½
Norway.. . . .	16
Czecho-Slovakia.. . . .	10
France.. . . .	5
Finland.. . . .	5
Italy.. . . .	13

The above rates are for unlimited right to broadcast.

It should be noted with regard to the Australian rate, that that is a rate arrived at by negotiation, and the Australian Broadcasting Company—which is controlled by the Australian Government—pays out of the licence fees collected from receiving sets one shilling (or twenty-four cents) per set, which leaves the privately-owned stations to pay only three pence (or six cents) per set.

Colonel Steele, of the Canadian Radio Commission, in giving his evidence, filed some very illuminating maps showing great American station interference with broadcasting stations in Canada, and if the return of $9\frac{1}{2}$ cents per set to the American Society of Composers, Authors and Publishers could obtain on the principle adopted by them, which is, "as much as the user can pay"—then this Commission is of opinion that the return of ten cents per receiving set in Canada is excessive.

After hearing all the evidence given on this branch of the inquiry, and after carefully considering the argument of counsel, this Commission thinks that a return of eight cents per set in Canada would give a generous return to the Canadian Performing Right Society Limited, and may not be unfair or unreasonable to the broadcasting stations.

In arriving at the rate of eight cents per set, consideration was given to the fact, which seemed generally admitted, that all the receiving sets in Canada are not licensed, and that the number of receiving sets is somewhat greater than the number which had been licensed. If a more careful check is made of the licences, and the number of licences is made to fairly represent the actual number of radio receiving sets, then the rate of eight cents per receiving set should be reduced at least to $7\frac{3}{4}$ cents to conform with the rate adopted in Great Britain.

PART XIX

THEATRE TARIFF

The fees for theatres charged in the tariff of 1934 is as follows:—

Ten cents per seat when performing more than three days per week.

Five cents per seat when not performing more than three days per week.

Then there are special rates for seasonal theatres.

The above rates were practically the same as those then in force in the United States prior to October 1, 1934, which rates, as amended, are as follows:—

	Effective October 1, 1934 Per seat Per Annum.	Prior to October 1, 1934 Per seat Per Annum.
1. All theatres with seating capacity of 800 or less (regardless of admission price or performing policy)	10 cents	10 cents
2. All theatres with seating capacity of 801 to 1,599	15 cents	10 cents
3. All theatres with seating capacity of 1,600 or more	20 cents	10 cents
4. All theatres with less than 800 seats, and showing three days or less per week	5 cents	5 cents

From this it will be noted that up to October, 1934, the maximum charge per seat in the United States was ten cents. Mr. Mills, of the American Society of Composers, Authors and Publishers, having concluded that the experimental period for collecting fees for performing rights in the United States was over, increased the rate effective after the 1st of October, 1934, to:—

Theatres with a seating capacity of 801 to 1,599	15 cents per seat
Theatres with a seating capacity of 1,600 or more	20 cents per seat

Leaving the small theatres of 800 seats or less as they were in the previous tariff.

It should be remembered that in the United States the American Society of Composers, Authors and Publishers had been carrying on the business of selling the performing rights of its repertoire since 1914, and it was only last year they decided that the "experimental stage was over." The Canadian Performing Right Society Limited has been selling the performing rights of its repertoire only since 1930, because, before that time, it did not own the valuable repertoire of the American Society of Composers, Authors and Publishers; so that the "experimental stage" in Canada can hardly be said to be over, but apparently the Canadian Performing Right Society Limited assumed

it was, and followed the lead of the American Society of Composers, Authors and Publishers, and filed a new tariff in January, 1935, which is as follows:—

1. Theatres performing more than three days per week, with the right to perform at any time during the week.. . . .	20 cents per seat
2. Performing more than three days a week, limited to the evening and performing three specified matinees weekly.. . . .	15 cents per seat
3. Performing more than three days a week, limited to evening performances.. . . .	12½ cents per seat
4. Performing not more than three days per week, with the right to perform at any time specified..	12 cents per seat
5. Performing not more than three days per week, limited to evening performances and three specified matinees per week.. . . .	10 cents per seat
6. Performing not more than three days per week, limited to evening performances.. . . .	7½ cents per seat

Midnight shows are counted as "Matinees," and the minimum annual fee was raised from \$10 to \$30.

Comparing the two tariffs, it may be noted that the American Society of Composers, Authors and Publishers does not take into consideration, except in one part of its tariff, the number of performances. Its rate for a theatre with a seating capacity of 800 or less—and this would include the great majority of the theatres in Canada—is 10 cents per seat. The same theatre under the Canadian tariff might be required to pay 20 cents per seat.

The evidence makes it clear that the raising of the minimum fee from \$10 to \$30 was done under pressure of Mr. Mills of the American Society of Composers, Authors and Publishers. It was not looked upon with favour by the directors of the Performing Right Society of London, England, but the raising of the minimum fee in the United States by Mr. Mills was reluctantly followed by the Canadian Performing Right Society Limited in Canada. Mr. Jamieson in justification, however, said in his evidence that he regarded the theatre tariff as inadequate and only waited to raise the rates in Canada until the rates had been raised in the United States.

The application of the tariff of the American Society of Composers, Authors and Publishers differed somewhat from the application of the tariff of the Canadian Performing Right Society. Mr. Mills, in referring to the tariffs of the American Society of Composers, Authors and Publishers said, "Those were the tariffs but they were not always adhered to." The application of the tariffs in Canada has been strictly adhered to, and the inflexibility of the administration has no doubt been responsible for a great many complaints which otherwise might not have been made.

A comparison of the two tariffs shows that in some cases the fees of Canadian Performing Right Society are higher than those of the American Society of Composers, Authors and Publishers, and in no case are the fees in the 1935 tariff of Canadian Performing Right Society less than the fees in the 1934 tariff of the American Society of Composers, Authors and Publishers.

In 1931 the tariff in Canada was regarded as fair and reasonable by the Society, and no sound reason is given for the raising of the rates here except that pressure for more revenue was placed on the Canadian Performing Right Society Limited. If anything the rate in Canada should be slightly less than the old rate of the American Society of Composers, Authors and Publishers, because in the United States, generally speaking, the theatres are open seven days a week.

Bearing these considerations in mind, and having regard to the fact that 10 cents per seat in the past has been acceptable to the Canadian Performing Right Society Limited and was not strenuously objected to by the larger theatres in Canada, it seems a fair conclusion that the rate of 1931 should not be changed, and that the 1935 tariff is unjust and unfair.

While the "experimental stage" in the United States may be over, the evidence shows clearly that the "experimental stage" in Canada is only at its beginning. No doubt, after this inquiry, there will be less resistance, and a disposition on the part of both the users and the Canadian Performing Right Society Limited to enter into negotiations when any departure from the tariff is contemplated.

The theatre tariff of the American Society of Composers, Authors and Publishers is regarded by that Society as the maximum tariff. The same may be said of the tariff of the Performing Right Society of London, England. It is to be noted that in arriving at the Hotel tariffs after negotiations the Canadian Performing Right Society agreed to make a concession on the basis of occupancy; and it seems only fair and reasonable that the Canadian Performing Right Society Limited should extend that concession to all theatres, and especially to those in the West where they are suffering from drought, and to other places in the East where the towns were dependent upon one industry, and that industry is not now in operation. The theatres were built some time ago and a seating capacity provided when conditions were more prosperous. You have in the Maritime Provinces, for instance, districts dependent solely upon coal mining and districts dependent solely upon lumbering. Both of these industries, according to the evidence, are at a standstill, and in some localities the percentage of people on relief is very considerable.

PART XX

HOTEL TARIFF

The Canadian Society, as already stated, values all of its licences on two basic principles: the maximum time within which permission to perform is desired, and the maximum audience before which the performance is to be given.

This being so, there is little value in considering the amount of money spent by the various hotels on musicians. In the evidence of Mr. Jamieson, and in the argument of the Society's counsel, the expenditure on music and musicians was repeatedly referred to as showing by way of comparison the small amount relatively demanded by the Society for fees.

Mr. O'Neill, President of the Ontario Hotel-keepers Association was of opinion that the 1934 tariff was fair for the large hotels, and the 1935 tariff is entirely too high for the small hotels.

In the 1934 tariff the minimum fee per annum for small hotels was \$15; in 1935 it was raised to \$30. Small hotels are those using radios, phonograph, loudspeaker, mechanical instrument or piano alone.

The tariff for large hotels is most intricate and complicated. It has been applied to the large hotels after negotiation, and therefore is understood to some extent by the negotiating parties. The tariff is framed, as are all the Society's tariffs, on the basis of the potential audience, with this exception—that reductions are made to hotels where the occupancy falls below a fixed percentage.

With the exception of the minimum initial fee, which in the tariff filed in 1935 is \$30.00, that tariff is identical with the hotel tariff filed in January, 1934, in respect to hotels using radio, phonograph or other mechanical instruments. The rates for these are:—

Minimum fee, \$30.00.

The annual fee is calculated as follows:—

In Public Rooms

At the rate of 5 cents per room for each instrument operated in the public rooms of the hotel, the maximum rate per room being 25 cents and the rate being charged on the total room capacity of the hotel.

In Guest Rooms

At the rate of 10 cents per room for radio receiving sets or loud speakers in the guest rooms of the hotel, the rate being charged on the total room capacity of the hotel.

NOTE.—No reduction in the above rates is allowed for a term of less than one year.

The tariff of 1931 was the same as that in effect in the United States at that time. The tariffs of 1934 and 1935 are not based upon the experience of any other country, but were worked out on the plan adopted by the Canadian Society.

On examination of the 1935 tariff, it appears that the user may have to pay two minimum tariffs in one year. When this was brought to the notice of the Society during the Inquiry, Mr. Jamieson said:—

“In the case of hotels where a licence is desired under one or more of the tariffs, only one minimum annual fee is payable, such fee to be treated as payment on account until such time as amounts payable within the year under all tariffs exceed the minimum.”

A small hotel of, say, twenty rooms subjected to the minimum tariff of \$30.00 is required to pay one and a half times the regular rate per room. In many of these hotels the only music used is a radio receiving set in the lobby of the hotel, or sometimes in the dining-room. In many cases, the evidence shows, these were placed there primarily (particularly in the Prairie Provinces) for obtaining grain quotations, and in many other small places for obtaining market reports. What music is listened to is of secondary and little account.

This Commission agrees with Mr. Mills, when referring to such small users of music, that the use has no commercial value. Generally speaking, where the cost of selling a licence is \$29.60, which is the cost given by the Society, no return to the author, composer and publisher can ever be derived from this source. When it becomes necessary to impose a minimum fee, it is an admission that the licence has little commercial value, and the Commission is of opinion that the Society, from the standpoint of the interest of the members of its parent Societies, should take this into consideration. As long as the microscope is used to locate the small user, so long will the Society's cost of operation be unduly high.

This Commission agrees entirely with Mr. Mills, General Manager of the American Society of Composers, Authors and Publishers, when he stated that these small users were not worth bothering about, and the limited amount of music they were capable of performing was negligible and of no commercial value. Seeking out the very small user in Canada and imposing a licence on him, is one of the remaining attempts to apply in Canada the methods adopted by the Performing Right Society, Limited, in Great Britain, where conditions are different and where negotiations are carried on, not with the individual, but with an association of which the individual is a member, and where a licence fee, if imposed, is collected without undue cost.

PART XXI

**PARKS, SMALL FAIRS, COMMUNITY HALLS AND OTHER
MISCELLANEOUS USERS**

It does not seem necessary to analyse and deal seriatim with these tariffs. Any music performed at these places is largely or wholly educational. Where no promoter uses these various institutions as a means to enable him to profit by the performances, they should be made exempt from paying a performing fee to the Society. The American Society of Composers, Authors and Publishers makes no attempt to impose a licence on or collect a fee from these users.

A very good example of the unfairness in imposing any small fee on the small fairs is furnished in Exhibit 93, submitted by Mr. John A. Carroll of the Department of Agriculture in Ontario. It is a list of fall fairs held each year in Ontario, and should fairly represent the situation in all the other provinces in Canada. There are 278 fairs listed, and the attendance ranges from one hundred to seven or eight thousand. Most of them, however, have an attendance of under one thousand; they are supported by Municipal and Legislative grants and private donations. If the proposed minimum of \$30 were demanded from these and they all took out a licence the Society would derive a revenue from Ontario small fairs of \$8,340. What for? Because at each of these fairs, for one or two days, music was played by gramophone or by the village band. The Performing Right Society, Limited, of London, charges for Village and Rural Parish Halls, School Rooms, Clubs and Welfare Institutes from 10s:6d. per annum and up, according to the seating capacity, with a minimum fee of £1:1s:0d.

That Society's tariff for Co-operative Halls, Masonic Halls, etc., is relatively low, with a minimum fee of £2:2s:0d. The American Society of Composers, Authors and Publishers impose no performing right fee on any of these establishments, unless they lend their patronage to a promotor.

PART XXII

RESTAURANTS, SKATING RINKS, SPORT GROUNDS, ETC.

From the evidence, it seems unfair that any substantial fee should be collected from our small restaurants. In any event, it should be much less than is collected in the United States. Restaurants in Canada generally do not receive patronage in the same way and to the same extent as restaurants in the United States. Those few restaurants that employ orchestras, or make use of what is referred to in the evidence as "live music," should pay a fee based upon the frequency of performances and the number of performers engaged. The objectionable feature of the tariff as applied to these restaurants is that they are required to pay upon a maximum number of hours of all or any musical performances, and the maximum number of performers. It is conceivable that during festive periods the maximum number of hours of performance and the maximum number of performers would be used, but then there is the balance of the year when they return to normalcy.

As for skating rinks, sport grounds, etc., a small charge such as has been adopted in the United States—arrived at by negotiation—seems more reasonable and fair than the microscopic tariff adopted by the Canadian Society.

PART XXIII

THE CANADIAN NATIONAL EXHIBITION

Fairs in Canada, generally speaking, are primarily agricultural and educational. The Canadian National Exhibition, according to the evidence before the Commission, is the one exception. It is partly agricultural, but to a very substantial extent commercial, and should pay some fee for the use of the Society's repertoire.

The present tariff for large exhibitions is based upon the total attendance for the duration of the exhibition, and is as follows:—

	per person
First 10,000 of attendance or part thereof	4 cents
Next 15,000 of attendance or part thereof	3 cents
Next 25,000 of attendance or part thereof	2 cents
Next 50,000 of attendance or part thereof	1 cent
Next 100,000 of attendance or part thereof	1 cent
Next 300,000 of attendance or part thereof075 cent
Additional attendance05 cent

A payment is required on account and in advance equal to 75 per cent due at the above rates on the estimated total attendance. Immediately after the close of the exhibition, the exhibition manager is required to certify the total actual attendance and then make payment of any balance due. The representative of the Canadian National Exhibition objected to the Society insisting that the actual attendance include all those at the various commercial booths and buildings, all attendants and labourers, and all persons who may enter on passes. It seems that a considerable part of the music performed at this exhibition is highly educative and cultural; some of it is competitive, having as its objective to create an incentive to better performance; and there is the commercial side. The Commission is of opinion that any fee imposed upon the Canadian National Exhibition should only be after there has been reasonable negotiation, and failing negotiation, it should be submitted to an Appeal Tribunal, such as is hereinafter referred to, to determine what is a fair and reasonable fee under all the circumstances. No evidence was given that would be of assistance in finding what would be a fair basis upon which to fix a fee.

PART XXIV

**CHANGES IN TARIFFS CONCEDED BY CANADIAN PERFORMING
RIGHT SOCIETY LIMITED**

Mr. Jamieson, President of the Canadian Performing Right Society Limited, filed in reply to the evidence previously submitted Exhibit 252, in which he concedes:—

- (1) That the Broadcasting tariff shall contain a provision that ten hours user is the maximum for which the Society will charge;
- (2) That the additional percentage for period payments will not be charged where such payments amount to \$50 or over;
- (3) That in the case of hotels, where a licence is desired under one or more of the tariffs, only one minimum annual fee is payable, such fee to be treated as a payment on account until such time as amounts payable within the year, under all tariffs, exceed the minimum;
- (4) That the Society will accept a minimum fee of \$10 for voluntary payment, but where payment is not made voluntarily, the minimum fee will be \$30.
- (5) That Border broadcasting stations shall be charged only in respect of the Canadian receiving sets allotted to the area in which the station is situated.

PART XXV

RÉSUMÉ

While discussing particular topics in the body of the report, it has been necessary to express conclusions and suggest recommendations with reference to the matters discussed. It seems desirable, however, at the risk of repetition, to gather together the more important findings and recommendations.

The most important problem before the Commission was to determine what would be a fair tariff of fees.

It is a fair assumption that the present tariff of the Canadian Performing Right Society Limited was made higher because of the expenses incurred in persuading a public that was often unreasoning and ignorant of the Society's legal rights to purchase a licence. The demand for payment by the Society was regarded as an unjust imposition, and the music user honestly believed that the author, composer or publisher was not entitled to any payment for his performing rights. On the other hand, the Canadian Performing Right Society Limited was at times domineering in its attitude, and perhaps a little hasty in resorting to the courts for the enforcement of its legal rights.

Due to the very nature of the intangible right possessed by the Society, it is most difficult, if not impossible, to determine what is a fair fee. It is to be regretted that no author or composer members of any of the Societies appeared to give evidence as to their need for greater remuneration for the product of their genius. It is also to be regretted that no publishers appeared to give evidence as to their need for greater returns on their investment. If they had shown what investment was wrapped up in their publishing houses, what they paid the authors and composers for their copyright, and what their returns on their investments were, it would have helped materially to solve the problem.

As has been stated elsewhere in this report, the Commission is of opinion that a return to the Canadian Performing Right Society Limited of eight cents for every licensed receiving set in Canada will provide a fair revenue for the Society and may not be unfair to the broadcasting stations. The Society, however, is not in as good a position as the broadcasting stations themselves to determine what part of this gross should be contributed by the various stations in Canada, and it was suggested by one of the witnesses, who was closely connected with broadcasting, that an association of the various stations could best determine what each station should contribute.

The Commission has come to the conclusion that the system obtaining in Canada at present, based upon the number of receiving sets within the effective range of the station, etc., should be continued.

In regard to theatres, the Commission is of opinion that the 1935 tariff is excessive, and the tariff of 1931 gives a fair return to the Society and should be restored.

In regard to hotels, the present tariff is satisfactory to the large hotels, but very unfair to the small hotels, most of which should be exempt from payment of fees for the use of a radio in the lobby.

Performances of any musical works by any small agricultural fairs and exhibitions, churches, colleges or schools, religious, charitable or fraternal organizations, should not constitute an infringement of copyright, and they should not be subject to the imposition of any fees by the Society if the performances are given for religious, educational or charitable purposes, without profit to themselves, notwithstanding that they may pay the performers of music.

As has been already stated, the new tariff raised the minimum fee in all branches of the tariff from \$10.00 to \$30.00. The only reasons given for raising this tariff was that the cost of selling the licences was \$29.60, and that the minimum fee was considered inadequate. The Commission is of opinion that with regard to the various small users the minimum fee should be abolished, and with regard to the moderate users of music, the minimum fee should be a nominal fee of \$5.00 or \$10.00, such as obtains in Great Britain.

By imposing a minimum fee of \$30.00 on the small user of its repertoire, which is in so many cases unfair and beyond the capacity of the user to pay; by insisting on applicants for licences paying "back fees" by way of penalty for alleged infringement of its rights as a condition precedent to the grant of a licence; by requiring the licensee to covenant to make returns of all music performed on his licensed premises in the form in which they are demanded, the Canadian Performing Right Society is unduly withholding the issue or grant of its licences.

The tariffs as fixed by the Performing Right Society Limited, of London, and the American Society of Composers, Authors and Publishers, has always been regarded by these Societies as their maximum tariff from which they may depart; and it is strongly suggested that the tariff from time to time adopted by the Canadian Performing Right Society, Limited, should always be regarded as the maximum tariff from which discounts may in certain cases be made.

The evidence of Mr. A. P. Herbert, Author, Dramatist, Librettist, Journalist and Barrister-at-Law, given before the Select Committee of the British House of Commons, shows how, as an individual and not as a member of any Performing Right Society, he would deal with the question of an application for a licence to perform his compositions. He said:—

"What I do is to temper the wind to the shorn lamb and to fix prices according to the prices they can pay (which is more than most sellers of commodities do.) But if a fixed price must be compulsorily stated, then naturally it will be a *maximum price*, and if a price to suit the Trocadero is fixed, then the Village Institute will be frightened away; per contra, if a price be fixed to suit the Village Institute, then the Trocadero will be getting its music for far less than it can afford to pay."

"What happens in practice, again, is what is reasonable. The author and composer take such terms as are suitable to the conditions; they will take one scale of royalties from Drury Lane, another from New York, another from the Stock Exchange Operatic Society, and *perhaps* a small lump sum from the small-town amateurs."

Strong protests were made during the Inquiry against the insistence of the Society upon returns of programs being furnished at the risk of cancellation of licence for failure to make them. This Commission is of opinion that some sort of return should be made by the larger music owners so that an equitable distribution of the Society's funds amongst its authors and composers could be made. These returns, however, could be very much simplified and therefore less onerous on the licensees. For instance, as regards broadcasting stations, where these stations relay programs from originating stations, the Society itself could obtain from the originating stations their programs, and from the relaying stations the periods of time during which the program from the originating stations were performed by them. As regards music originating at the various broadcasting stations, the stations could give the titles of the music played by them, and the Society with its greater fund of information, could readily determine the authors and publishers of the same.

Hotels, where "live music" is played, could without much trouble make returns to the Society of the music played by its performers, and where mechanical music only is played, the licensee could without much trouble furnish to the Society the names of the records.

In other words, it is suggested that the licensees only be required to give sufficient information in their returns that would enable the Society to determine who is the author and composer.

It was suggested during the Inquiry that the Canadian Performing Right Society Limited, be required to put up security for costs in litigation, but as the Society is, as has already been stated, a Canadian national, this Commission does not see fit to make any recommendation in regard to that matter.

The recommendations that have been made are based upon the fact that the Canadian Performing Right Society Limited is the only Society operating in Canada. If another Society having a substantial repertoire were to enter into competition with the Canadian Performing Right Society there would of necessity have to be some revision of its tariffs.

It is strongly recommended that the Canadian authors and composers be recognized by the Canadian Performing Right Society Limited in some way so that it would be possible for them to have their repertoire included in the repertoire of the Society, and to derive the benefits that the Copyright Act intended to confer on them.

The Commission recommends that legislation be introduced having the following objects:—

(1) That there be included in the Canadian Copyright Act a clause similar to Section 40 of the Patent Act (R.S.C., 1927, c. 150), to prevent vexatious and unwarranted legal proceedings;

(2) That Section 17 of the Copyright Act be further amended to make the societies mentioned in Subsection (i), (vii), (viii) fully exempt from infringement and from the payment of performing right fees, notwithstanding the fact that they pay a fee to the individual performers; providing they do not lend themselves to promoters;

(3) That the Copyright Act be amended so as to provide for the establishment of an Appeal Tribunal, to determine disputes arising out of performance in public and to approve of the tariffs of the Canadian Performing Right Society Limited from time to time before they become effective.

The position now is that the Society, having a monopoly of the performing rights in copyright music, has also the right to impose whatever fees it chooses. Where other monopolies have existed, it has been found necessary to have some independent body analyse and pass on the tariffs of fees that may be charged, e.g. freight rates, express rates, telephone rates, etc. If the Society can continue to dictate its own terms, and pursue a policy of greatly increasing those terms, then finally the community will be prevented from listening to its music.

The Commission is altogether in accord with the recommendation of the Honourable Mr. Justice Owen in his report resulting from the Inquiry in Australia, with the recommendation and the report of the Select Committee of the House of Commons in 1930, and with the recommendation contained in the report of the Honourable Mr. Justice Ewing in 1932, that there should be an amendment to the Copyright Act to the effect that either the various tariffs as filed by the Canadian Performing Right Society, Limited, should first receive the approval of some independent board, or to the effect that if any users felt that they were being charged unfair and exorbitant fees they would have a right of appeal to an independent body. Some doubt exists as to whether this could be done without offending against the terms of the Rome Convention, but this Commission is of the opinion that as long as the representation of the British and foreign societies remains in the Canadian Performing Right Society, Limited, which must be considered a Canadian national, that Parliament can regulate the Society at least to this extent.

This Commission is indebted to the reports of the Honourable Mr. Justice Ewing, the Honourable Mr. Justice Owen, and the report of the Select Committee of the House of Commons. The representatives of the Canadian Performing Right Society Limited, and the American Society of Composers, Authors and Publishers, gave every possible help to assist in helping this Commission solve a most difficult problem. Any documents that were asked for were readily furnished. Counsel for the Societies and Counsel for all parties represented co-operated with this Commission to the fullest extent. The subject matter of this Inquiry being so new, and the basis of arriving at fair fees being so difficult to determine, if any benefit results from this report all these parties have contributed to it.

All of which is respectfully submitted.

J. PARKER,
Commissioner.

Dated at Toronto, this 29th Day of October, A.D. 1935.

